IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10- COURT'S ORDER WHETHER THE CASE IS

OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32(2) (b)]

Criminal Appeal No. 132/2002

Harbhajan Singh … Appellants.

Vs.

State .. Respondent.

Decided on 13-09-2005

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(Irshad Hussain, J.)

(B.S. Verma, J.)

Dated: 13-09-2005.

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 132/2001

Harbhajan Singh @ Bhajan Singh
S/o Srirampur, P.S. Rudrapur,
District Udham Singh Nagar .. Appellant.
Vs.
State .. Respondent.

Smt. Pushpa Joshi, learned counsel for the appellant.
Sri Amit Bhatt, learned A.G.A. assisted by
Sri Suhail A Siddiqui, learned Brief Holder for the State.

Coram : Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.

Dated: 13-09-2005

(Per: Hon'ble Irshad Hussain, J.)

This appeal is directed against the judgment dated 3-6-2002 passed by the then Sessions Judge, Udham Singh Nagar, at Rudrapur, convicting and sentencing the accused-appellant to imprisonment for life under Section 302 I.P.C. read with Section 149 I.P.C.

2- Written report, Ext. Ka. 1 of the incident was delivered by the informant- eye witness Jeet Singh (P.W.1) at P.S., Rudrapur at 5.05 A.M. on 13.2.1987 regarding the incident which took place at his house in village Srirampur at about 1.30 -2.00 A.M. in the night between 12/13-21987 and on its basis check F.I.R., Ext. Ka.2 was drawn and relevant G.D. entry was made to register case crime No. 48/1987 under Section 147, 148, 149, 302, 307 I.P.C. against the accused-appellant Harbhajan Singh and four other co-accused Subeg Singh, Seesha Singh, Gurumukh Singh and Darshan Singh. As per the narrative of the written report, the prosecution case is :

Accused Harbhajan Singh is the younger brother of informant Jeet Singh. Their relations were not cordial due to dispute of partition of landed property. Both the brothers reside in separate houses in village Srirampur whereas their father Didar Singh was residing in village Kartarpur of Police Station, Bilaspur, District Rampur along with three other younger brothers of the informant. Marriage of younger sister and younger brother of the informant

and the accused were solemnized in village Kartarpur on 6th and 8th February respectively. Informant went to village Kartarpur to participate in the marriage festivities along with his wife and children about 15 days ago and a co-villager Kulwant Singh (P.W.3) was then asked by the informant to take care of the cattle and house of the informant in his absence.

3- On 12-2-1987 at about 8 P.M. informant Jeet Singh returned to his village Srirampur along with his wife and three children and his brother-in-law (wife's brother) Harjinder Singh (P.W.2). After some time the informant retired to sleep with his family members in his house and whereas witnesses Harjinder Singh and Kulwant Singh went to sleep in the thatch situate in front of the living room of the house of the informant. As usual a lantern was glowing in the verandah and whereas as kerosene Dibbi was burning inside the room of informant. At about 1.30- 2.00 A.M. in the night accused Harbhajan Singh knocked the door of the room while also abusing the informant. The informant opened the door and then he saw accused Harbhajan Singh there at the door carrying a 'Dater'. Others who were accompanying Harbhajan Singh were his father-in-law Subeg Singh armed with sword, his brother-in-law (wife's brother) Seesha Singh armed with 'Dater', Gurumukh Singh also carrying a 'Datar' and Darshan Singh then possessing as pistol. At that point of time accused Harbhajan Singh gave a call that all the occupants should be killed and none should be spared. All these intruders including the accused then pounced upon the informant and at the same time started assaulting informant's wife Smt. Jasvinder Kaur and his three minor children Balvinder Kaur alias Babli, Ravindra alias Rani and Gurdeep Singh by wielding their 'Datars' and sword. Informant Jeet Singh was, however, able to get himself freed from the clutches of these culprits and ran towards village Abadi to save himself. He was then fired at by pistol by Darshan Singh but escaped unhurt. Darshan Singh could not catch the informant due to his defective leg.

4- Informant thereafter raised alarm attracting the village people to the place of the incident whereupon all the five culprits including the accused Harbhajan Singh fled away towards south of

the village. At this stage witnesses Harjinder Singh and Kulwant Singh came out of the thatch claiming that the incident had been witnessed by them while they remained inside the thatch due to fear of being killed by the accused and others.

5- After registration of the case against the accused-appellant and four others, the investigation of the crime was taken up by S.I. Gyan Chandera Singh Yadav, who held inquest on the dead bodies of the four victims, dispatched these for post mortem, arrested all the five named accused including the accused-appellant on 17-2-1987 while they were going on a tractor from a forest in the vicinity of Police Station, Rudrapur and a 12 bore country made pistol and three live cartridges were recovered from Darshan Singh and whereas three 'Datars' from Harbhajan Singh, Seesha Singh and Gurmukh Singh and one sword from Subeg Singh were then recovered and memo, Ext.Ka.33 was prepared. On completion of the investigation, charge sheet was submitted against all these five culprits including the accused-appellant.

6- Record reveal that all these five were committed to court of Sessions for their trial in sessions trial No. 94/1987 before the II Additional Sessions Judge, Nainital. Out of these five, Subeg Singh died during the trial and order of abatement of the trial against him was passed. Accused-appellant Harbhajan Singh failed to appear before the Sessions Judge and was declared absconder. His case was therefore separated on 24-7-1995 and other three namely Seesha Singh, Gurumukh Singh and Darshan Singh were tried on the charge under Section 302 read with Section 149 I.P.C. All these three were however held not guilty and acquitted of the charge per judgment dated 22-8-1996 by the then II Additional Sessions Judge, Nainital. When the accused-appellant was arrested he was put to trial in the Sessions Court, District Udham Singh Nagar at Rudrapur and was charges under Section 302 read with Section 149 I.P.C. on 29-8-2000 by the then Additional Sessions Judge, Udham Singh Nagar. He pleaded not guilty and claimed to be tried.

7- At the trial, prosecution examined four witnesses, informant Jeet Singh (P.W.1), Hajinder Singh (P.W.2) and Kulwant Singh (P.W.3). A.S.I. Jagdish Chandra (P.W.4) was examined to prove

that case properties were destroyed on 30-9-1997 in compliance of the order of the II Additional Sessions Judge, Nainital and entry to this effect at serial No. 35 was made in Malkhana Register, Ext. Ka.44.

8- The defence admitted genuineness of the documents of the prosecution which are post mortem examination reports of Km. Balvinder alias Babli, aged about 11 years; Master Gurdeep Singh aged about 5 years; Km. Ravinder Kaur alias Rani aged about 8 years and Smt. Jasvinder Kaur wife of informant Jeet Singh (Ext.Ka.3, Ext. Ka.4, Ext. Ka.5 and Ext. Ka.6 respectively) and inquest reports of the dead bodies of all these four victims (Ext. Ka.20, Ext. Ka.13, Ext. Ka.27 and Ext. Ka.15 respectively) and medical examination reports, Ext. Ka.21 of informant Jeet Singh. Other papers pertaining to attachment of the case properties were also exhibited as their formal proof was also dispensed with by the defence and so was the case with the charge sheet, Ext. Ka.43 placed against the accused-appellant and four others on 17-3-1997 by S.I. Gyan Chandra Singh Yadav.

9- per medical examination report, Ext. Ka.21 of informant Jeet Singh (P.W.1), the said injured was examined at Government Hospital, Dineshpur at 8.30 A.M. on 13.2.1987 and following injuries were detected on his person:-

1- Multiple abrasion 4cm x 2cm area, left side of forehead, just above left eye brow.

2- Abrasion ½ cm x ¼ cm on the root of little finger of left hand.

Both the injures were simple and caused by blunt weapon within six hours.

10- In defence certified copy of judgment dated 22.8.1996 passed by the then II Additional Sessions Judge, Nainital in sessions trial No. 94 of 1987 arising out of the same incident and whereby the three named accused Seesha Singh, Darshan Singh and Gurumkh Singh were acquitted of the charge under Section 302/149 I.P.C. and trial against the deceased accused Subeg Singh abated as mentioned in the earlier part of the judgment; certified copies of the statements of informant Jeet Singh as P.W.1, of witness

Kulwant Singh as P.W.2 and statement of Harjinder Singh as P.W.3 recorded in the said sessions trial were filed on record per list 77-B on 5.2.2002 and which were taken on record in defence by order dated 8.2.2002.

11- Placing reliance on the evidence of the three witnesses of the prosecution learned Sessions Judge accepted the prosecution version as truthful. The learned Sessions Judge was of the view that although all these three witnesses were declared hostile and have not supported the prosecution case against the co-accused named in the F.I.R. in separated criminal trial No. 94/1987, their evidence has had no adverse effect on their reliable evidence regarding the involvement of the accused-appellant in the commission of the crime. The accused-appellant was thus held guilty, convicted and sentenced as aforesaid.

12- Learned counsel appearing on behalf of the accused argued that the trial court fell in error in placing reliance on the evidence of the three so called eye witnesses and who have not supported the prosecution case against other co-accused in a separate trial and were declared hostile by the prosecution. According to learned counsel it will create an anomalous position in the law if in regard to the same incident their evidence, though was at variance to the case of the prosecution in the earlier trial, were to be relied upon in respect of the same allegations against the other accused and that the trial court failed to take this legal aspect of the matter in to consideration while making an appraisal of the evidence of the witnesses. Learned counsel also submitted that even otherwise if the accused and other assailants were after the informant Jeet Singh and wanted to eliminate him it was highly improbable that he was able to free himself from the clutches of the five assailants who have allegedly pounced upon him as soon as the door of the house was opened by him and that in the totality of the circumstances of the case his presence at the scene of the occurrence becomes high doubtful and no reliance on his evidence should have been placed towards proof of the prosecution case. In regard to the other witnesses Harjinder Singh and Kulwant Singh, learned counsel argued that it was also highly improbable that during dead hours of

the night they were able to witness the occurrence from the thatch which had a door not facing towards actual place of the incident, the room of the house of the informant situate in the south at a distance of about twenty paces. Learned counsel submitted that their evidence was also wrongly held as reliable and credible by the trial court and that in the totality of the circumstances of the case the accused could not have leally been held responsible for the commission of the crime.

13- On the other hand learned A.G.A. supported the judgment of the trial court by submitting that the evidence of the three eye witnesses was rightly considered in relation to the involvement of the accused in the commission of the murders of the four victims even if these three witnesses have not proved the implication of other co-accused in a separate trial decided earlier in the year 1996 by the then II Additional Sessions Judge, Nainital. He submitted that the appeal is devoid of merit and deserves to be dismissed.

14- From perusal of the post mortem examination reports of the four victims of the case it is evident that they were caused fatal incised wounds on their bodies and in the opinion of the medical officer deaths were caused due to shock and haemorrhage as a result of ante mortem injuries about one and a half day ago. The post mortem examinations were performed on 14.2.1987 between 10.30 A.M. to 2.45 P.M. and according to the prosecution the occurrence took place at about 1.30-2.00 A.M. on 13.2.1987 and therefore the medical evidence support the prosecution case about the time of the occurrence. The medical evidence also proved beyond doubt that the death of all these four victims were homicidal and whosoever caused them fatal incised wounds had intended to commit their murders. The inquests on the dead bodies were held in the residential house of the informant and therefore this fact support the prosecution claim that the occurrence took place in the house of the informant. These facts were also not challenged by the defence and the evidence on record also corroborate the prosecution case that the four victims were murdered at the time and place as stated by the prosecution.

15- In regard to the actual occurrence of assault on the victims of the case the positive case set up by the prosecution was that as soon as the informant Jeet Singh (P.W.1) opened the door of his house in response to the knocking made by the accused before us who was also making uncomplimentary remarks against the informant all the five assailants including this accused pounced upon the informant and a call was given by this accused that the informant and other occupants should be killed and should not be spared. It is also the case that the assailants namely accused Harbhajan Singh and his companions Subeg Singh, Seesha Singh and Gurumukh Singh fatally assaulted the four deceased of the case by wielding their 'Datars' and sword whereas the informant got himself freed from the clutches and ran away raising alarm from there to save himself. While he was running one of the assailant Darshan Singh fired pistol shot which however did not hit the informant and his life was saved.

16- Informant Jeet Singh (P.W.1) narrated almost similar version in his examination-in-chief to prove the prosecution case. He has however not named all the five assailants nominated in the written F.I.R. but gave out that the accused Harbhajan Singh was carrying a Datar and his 3-4 companions were armed with 'Datars' and swords and that accused Harbhajan Singh and another assailants at once entered inside his house whereas other assailants pounced upon him whereupon he ran away from there and at that time his children were raising alarm and were crying. Other two so called eye witnesses Harjinder Singh (P.W.2) and Kulwant Singh (P.W.3) who were according to the prosecution sleeping in a thatch, shown by letter 'C' n site-plan, Ext. Ka.36, situate in the north- west of the house of the informant, woke up on hearing the noise of alarm and crying. Both these witnesses orchestrated almost the similar narration in their examination-in-chief with a view to support the prosecution case and corroborate the evidence of the informant. Learned counsel appearing on behalf of the accused persuasively argued that according to the prosecution accused was entertaining enmity against the informant and wanted to eliminate the informant and in a situation like this it was highly improbable

that the informant would have opened the door of his house in the dead hour of the night when the door was knocked by the accused who was also then making uncomplimentary remarks against the informant and that this aspect of the matter itself belie the prosecution story. Learned counsel also submitted that even if for arguments sake it is to be taken that the door was opened on the knocking of the accused who was armed with a lethal 'Datar' accompanied by his three or four armed companions and as soon as the door of the house was opened by the informant the accused and others pounced upon him it was highly improbable that the informant could have been able to free himself from the clutches of five persons who were mainly after him and could have escaped without having received a single injury of the sharp edged weapons and one fire arm which the assailants were then carrying to assault him. Learned counsel also drew attention to the injury report, Ext. Ka.21 of the informant Jeet Singh and submitted that the minor abrasion on the little finger of the left hand and simple abrasions on the forehead could not at all be attributed to any overt act of assault by the accused or any of his companion and these simple abrasions must have been manufactured to make it show that the informant happened to be there at the scene of the incident and managed to escape from the clutches of the accused and his companions. The injury report of the informant, in fact, in turn lent credence to the submission that the witness was not present at the scene of the occurrence and his claim to the contrary is false and untrustworthy. It is also of significance that in the cross-examination this witness stated that he can not say as to whether the minor injuries found on his person on medical examination were caused at the hands of any of the assailant or by any of their arms. The shaky evidence of the witness thus run counter to the positive case set up by the prosecution and in the totality of the circumstances of the case we find it difficult to reject the submission made by the learned counsel for the accused.

17- The reason, for the above inference, being that in the face of the admitted enmity, the informant was not in the first instance, expected to have opened the door at odd hours of the night,

particularly when the accused while knocking the door was also using abusive language against the informant and we are convinced that the occurrence appear to have not taken place in the manner as alleged by the prosecution and started thereto by these witnesses. We are also convinced that it is highly improbable and do not stand to reason that the informant would have been able to free himself unharmed from the clutches of as many as five armed assailants and who were there only with the main object of eliminating the informant by assaulting him with their weapons. It shall not be out of place to mention that the small door of the house of the informant, as shown in site plan, Ext. Ka.36, would not have facilitated the informant to run away from it when as many as five assailants may be right at the door of the house to enter in the room and particularly when the assailants have already pounced upon their prey, the informant. As is said the circumstances can not lie the inference against the prosecution and veracity of its evidence is writ large. There can be no gain saying that to show the presence of the informant Jeet Singh at the scene of the occurrence the simple injuries of the nature of abrasions as referred above were in all probability manufactured and this aspect of the matter further lent credence to the inference that the occurrence did not take place in the manner as alleged by the prosecution and stated to by these witnesses.

18- That thatch of the informant as referred above is situate at a distance of about twenty paces from the living room of the informant in which his other family members were murdered in the dead hour of he night. The thatch is situate in the north-west of the house and has its opening towards east meaning thereby its opening does not face the living room of the informant. P.W.2 and P.W.3 claimed that on hearing alarm and noise they woke up and out of fear of the assailants remained inside the thatch. There was no light inside this thatch and they claimed to have not come out of the thatch out of fear of the assailants but gave out that they saw the entire incident from the east facing opening of the thatch. Considering the location o the thatch and its opening towards east it is highly improbable that any of the occupant of this thatch would

be able to see the occurrence without coming out of the thatch and by merely peeping through the opening which was not facing the living room of the informant and in which the entire occurrence took place. The living room of the house of the informant does not have a large door and on this account also it was not at all probable that these two witnesses were able to identify the assailants and to see as to what was happening inside the living room of the house of the informant during the dead hours of the night even if a gas lantern was then glowing in the Verandah of the living room of the informant. Strangely enough these two witnesses claimed to have seen the accused and his companion and also the manner in which they were assaulting the four victims by their respective weapons and this itself exhibit total falsity of their claim. Considering these peculiar aspects of the matter we find force in the argument of the learned counsel for the accused that the learned Sessions Judge fell in error in placing implicit reliance on the evidence of all these three witnesses and we have no hesitation in observing that the claim of the three witnesses that they were present at the scene of the incident does not appear convincing. Therefore, their evidence fail to repose confidence and to prove the prosecution version about the involvement of the accused in the commission of the crime.

19- Inquest reports of the dead bodies of four victims, Ext. Ka.3 to Ext. Ka.6 reveal that the dead body of Km. Balvinder alias Babli was found lying on cot ‘B’ whereas the dead bodies of Smt. Jasvinder Kaur and Km. Ravindra Kaur were found lying on another cot marked by letter ‘A’ in the site-plan, Ext. Ka.36 in the room of the house of the informant Jeet Singh. The dead body of master Gurudeep Singh was found lying in the courtyard at point ‘I’ shown in the site plan and it was mentioned that the dead body of this deceased was shifted from the cot marked by latter ‘A’ after incident by the informant. These facts indicate that the four victims were brutally murdered while they were sleeping in their respective cots and in all probability were not alarmed by the presence of five armed assailants who have according to the prosecution case forced the informant Jeet Singh to open the door of the room during the dead hours of the night of the incident. As stated above it was also

the positive case of the prosecution that the accused while knocking the door of the room of the house was also using abusive language against the informant and further that as soon as the door was opened by the informant these assailants pounced upon him. Learned counsel appearing on behalf of the accused argued that if the door of the room was to be opened in this way and as many as five armed assailants were to enter inside the room to lay their hands on their prey a state of commotion in all probability was bound to disturb these four sleeping victims and in that event all these four would not have remained lying on the cots to be slained in sleeping posture as was found at the time of the inquest on the dead bodies and that this glaring aspect of the case give a fair indication that the occurrence has not taken place in the manner as alleged by the prosecution and as stated thereto by the above witnesses. This factual aspect of the case make it difficult to reject the submission of the learned counsel and in the totality of the circumstances of the case this factor also make a dent in the credibility of the claim of the prosecution and the veracity of its evidence.

20- Another peculiar aspect of the case is that, as stated above, all these three witnesses were examined earlier in the part trial of the remaining four named accused, namely Subeg Singh, Seesha Singh, Gurumukh Singh and Darshan Singh and out of whom Darshan Singh had died during the pendency of the sessions trial. All these three witnesses were declared hostile by the prosecution in view of their claiming that those co-accused were not among the assailants who committed the crime in question. The certified copies of the judgment of the earlier part trial and the statements of these witnesses were placed on record and it is evident that informant Jeet Singh has then claimed that the names of those accused were mentioned in the F.I.R. by him at the asking of co-villagers. However he on being cross-examined in the instant case gave out that he had lodged the report against all the five accused. According to him when he had opened the door in the night of the occurrence all these five including the accused before us were there masking uncomplimentary remarks against him. In the next breath

he however gave out that he could identify only his bother accused Harbhajan Singh and others were not identified by him at that time. It may be noted that two of the other four accused were the father-in-law and brother-in-law of the accused before us and they were thus also related to the informant. We can not believe that if the incident were to take place as alleged by the prosecution the informant would not have been able to identify the assailants other than the accused also. It is thus evident that the witness has changed his version once too often and this aspect of the matter also tell upon adversely on his credibility. In other words he can very well come put with a false version to implicate his brother and other relatives and to his own convenience may change his version set up in the first instance in regard to the alleged occurrence.

21- The other two witnesses also resiled from their earlier stand in part trial and they were also confronted with their earlier version as given to the Investigating Officer about the incident in regard to the involvement of all the named accused in the commission of the crime and they could not give plausible reason as to why the stand was changed about the other four named accused of the crime and it is thus evident that they have also changed their stand once too often and their evidence can not be said to be reliable on this count also.

22- While referring to the statements of all these three witnesses as recorded in the earlier mentioned sessions trial, learned counsel of the accused also rightly pointed out that significantly enough these witnesses have not narrated as to how this accused Harbhajan Singh acted as one of the assailant of the victims although that was the first opportunity for them to make an assertion, on oath about the overt acts of this accused in the commission of the crime even if these witnesses were to show their ignorance about the identity of other 3-4 assailants who also participated in the fatal assaults on the victims. No doubt this accused was not facing the trial at that time as his case was separated but the witnesses by narrating the events of the incident should have specifically referred to the overt acts and the specific weapon wielded by the assailant about whose identity they have

had no doubt and then showing their ignorance about the identity of 3-4 other assailants. Not only this, informant Jeet Singh in his statement in that case, Ext. Kha.1, had not even referred to this accused as one of the assailant who wielded sharp edged weapon against the victims. Learned counsel thus submitted that the said omission was in fact deliberate one as the informant, on account of admitted enmity resulting from partition dispute of landed property with this accused, kept the option open for future bargaining knowing it well that the crime was committed by unknown assailants when the informant and other witnesses were not there at the scene of the incident. It was also submitted that on account of enmity this accused was also falsely roped in as was the case in relation to other four assailants who were implicated by their names and who were later on let off by these witnesses in the manner as referred above. Having regard to the broad features, facts, circumstances and the evidence in the case, these submissions of the learned counsel also can not be said to be unsustainable and in turn to observe that the above aspect of the matter further lent credence to the inference that the evidence of the prosecution being not definite and cogent fail to repose confidence so as to place reliance on the claim of the prosecution and its evidence.

23- Upon re-appreciation of the evidence, the facts and circumstances as discussed above there can be no doubt that the crime was ghastly, in the sense, that a hapless woman and her three minor children were brutally murdered, but in view of the evidence of the case there is a serious doubt about the accused having participated in the incident and in the manner as alleged by the prosecution. In these circumstances it is not possible to uphold the conviction of the accused. Therefore, we give him benefit of doubt.

24- In the aforesaid premise the appeal deserves to be allowed, which we direct. The judgment dated 3-6-2002 is set aside and the accused Harbhajan Singh is held not guilty and acquitted of the charge under Section 302 read with Section 149 I.P.C. The accused is in jail. He shall be released forthwith, if not wanted in any other connection.

16- Let the record be sent back to the trial court for compliance, to be reported in two months.

(B.S.Verma, J.) **(Irshad Hussain, J.)**

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